IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Donofrio, PJ, and Zahra and Kelly, JJ

JOANNE ROWLAND,

Plaintiff-Appellee,

v

WASHTENAW COUNTY ROAD COMMISSION,

Defendant-Appellant,

-and-

NORTHFIELD TOWNSHIP,

Defendant.

Supreme Court Docket No. **130379**

Court of Appeals Docket No. 253210

Washtenaw County Circuit Court
Case No. 03-128-NO

DEFENDANT-APPELLANT WASHTENAW COUNTY ROAD COMMISSION'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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REBUTTAL ARGUMENT

I. *BROWN* v *MANISTEE CO RD COMM*, 452 MICH 354; 550 NW2d 215 (1996), WHICH DECLINED TO OVERTURN THE ACTUAL PREJUDICE REQUIREMENT OF *HOBBS* v *STATE HWY DEP'T*, 398 MICH 90; 247 NW2d 754 (1976), DOES NOT MEAN THAT *HOBBS* SHOULD REMAIN VALID LAW.

Plaintiff-appellee criticizes the Road Commission's Brief on Appeal for what plaintiff describes as a "glaring omission" of "any meaningful reference" to *Brown* v *Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996). Plaintiff argues extensively that because *Brown* declined to overturn the "actual prejudice" requirement that had been engrafted onto MCL 691.1404 by *Hobbs*, that this Court should again do the same. To the contrary, *Brown* itself does not compel this Court to perpetuate the error in *Hobbs*.

Nothing within the *Brown* majority decision adds to, explains, or justifies the reasoning of *Hobbs*. Rather, the *Brown* majority simply concluded that "the doctrine of stare decisis mandates [*Hobbs*'] reaffirmance. The *Brown* Court expressly relied heavily on its observation that "despite the Legislature's ability to change the statutory language or disapprove of this Court's interpretation of § 4, it has acquiesced in the *Hobbs* decision for nearly 20 years." *Brown* v *Manistee Co Rd Comm*, 452 Mich at 365. Commenting that it is better that the "law be settled than that it be settled right," the *Brown* majority nevertheless noted—without explanation—that it was "not convinced that *Hobbs* was wrongly decided." *Brown*, 452 Mich at 365 n17, 366. Additionally, the *Brown* majority expressed its view that "more injury would result from overruling [*Hobbs*] than from following it." *Id.* at 366.

Nothing in *Brown* suggests ***why*** more injury would result from overturning *Hobbs* than from continuing to follow it. Respectfully to the majority decision in that case, more harm would result by perpetuating the *Hobbs* error. For this Court to uphold *Hobbs* would undercut "the essence of the rule of law; [for a citizen] to know in advance what the rules of society are" through reference to the "words of the statute itself." *Robinson* v *Detroit*, 462 Mich 439, 467; 613 NW2d 307 (2000). As this Court has

recently observed, "[w]hen that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction." *Id.* at 469.

Moreover, the *Brown* majority's heavy reliance upon the doctrine of legislative acquiescence must be rejected here. At the heart of the *Brown* majority's reasoning—and similarly critical to the plaintiff's argument in this case—is the suggestion that it is for the Legislature to amend MCL 691.1404 to eliminate the "actual prejudice" requirement created in *Hobbs*. The fundamental flaw in this argument was revealed by Justice Riley, dissenting in *Brown*:

> The majority relies on legislative acquiescence to uphold the *Hobbs* prejudice requirement. This argument is wholly without merit. In *Hobbs*, the Court upheld the constitutionality of the 120-day notice provision provided that prejudice be read into the statute. To overcome the previously adjudged constitutional infirmities of notice requirements, the *Hobbs* court simply held, albeit improperly, that actual prejudice to the State was the only legitimate purpose for the notice provision. ***Accordingly, the Court held that the requirement of prejudice saved the statute from constitutional infirmity. The Legislature, therefore, was without authority during the past 20 years to eliminate the prejudice requirement which the Hobbs court engrafted upon the statute.*** The dissent's [sic] legislative acquiescence argument ignores the fundamental principle that "[c]onstruction of the constitution is the province of the court's and this Court's construction of a State constitutional provision as binding on all departments of government, including the legislature."

Brown, 452 Mich at 372 (Riley, J., dissenting) (emphasis added) (internal citation omitted) (quoting *Richardson* v *Sec'y of State*, 381 Mich 304, 309; 160 NW2d 883 (1968)). In other words, the majority's argument in *Brown*, as well as the plaintiff-appellee's argument here, ignores that the Legislature has ***not*** been free over the past 30 years to simply re-word the statute so as to expressly reject *Hobbs*. Simply amending the statute to show its disagreement with *Hobbs* and *Brown* would not avoid the undergirding constitutional infirmity, notwithstanding that that infirmity is wholly illusory.

For these reasons, the mere fact that the *Hobbs* error was perpetuated in *Brown* does not compel the conclusion that this Court should, once again, leave the "actual prejudice" requirement in tact.

II. THE "REAL-WORLD DISLOCATION" DISCUSSED IN PLAINTIFF'S BRIEF IS FICTIONAL

Plaintiff-appellee argues that stare decisis requires continued validity of the *Hobbs* "actual prejudice" requirement because to hold otherwise would result in a "practical real-world dislocation" in the sense that a plaintiff should be able to rely on the fact that the statute of limitations for a highway exception claim is two years, as provided by MCL 691.1411(2). Plaintiff contends that a 120-day notice provision without an actual prejudice requirement would somehow render the two-year statute of limitations nugatory. Respectfully to the plaintiff, this argument is not compelling.

As indicated by Justice Riley in her *Brown* dissent, the 120-day notice requirement is simply one of the conditions imposed by the Legislature in exchange for the waiver of immunity: "Certainly, if the Legislature may provide no recovery at all, it may place a condition on recovery, i.e., a *reasonable* notice provision." *Brown*, 452 Mich at 371. There is nothing about a 120-day notice provision—with or without an actual prejudice requirement—that would render the two-year statute of limitations nugatory. Rather, both the notice requirement and the statute of limitation can co-exist perfectly. A highway exception plaintiff would simply have to comply with ***both*** to benefit from the Legislature's limited waiver of immunity.

III. THIS COURT'S RECENT DECISION IN *GRIMES* v *MICHIGAN DEP'T OF TRANSP*, 475 MICH 72; 715 NW2d 275 (2006) FURTHER CLARIFIES THAT THE PLAINTIFF'S CLAIM MUST BE DISMISSED ON THE ALTERNATIVE GROUNDS THAT THE ALLEGED SURFACE DISCONTINUITY WAS WITHIN A "SOFT SHOULDER," WHICH DOES NOT IMPLICATE THE HIGHWAY EXCEPTION.

In *Grimes* v *Michigan Dep't of Transp*, 475 Mich 72; 715 NW2d 275 (2006), this Court recently clarified that an alleged highway defect must not only be within the physical structure of the roadbed surface, but must also be within the improved portion of the highway that is designed for vehicular travel. There, this Court determined that an improved shoulder, although it is capable of ***use*** by vehicles, is not ***designed*** for vehicular ***travel*** within the meaning of the statutory exception. Therefore, the plaintiff's

claim in *Grimes* that an "edge drop" created by the intersection of a paved roadway surface and an improved gravel shoulder caused her to lose control was not actionable.

In this case, as in *Grimes*, the plaintiff's claim fails to implicate the highway exception because there is no genuine issue of material fact concerning whether the alleged defect existed within the improved portion of the highway designed for vehicular travel. Plaintiff-appellee argues in her brief that there is sufficient evidence in the record from which a reasonable jury could conclude that the hole in which she is alleged to have fallen existed "in the crosswalk of the improved portion of the roadway designed for vehicular travel." However, also in that same brief, plaintiff describes the location of the alleged hole as the "shoulder crosswalk of the intersection at Jennings and Main Street . . . ." (Plaintiff-Appellee's Brief on Appeal at 2). Indeed, the allegations of the Complaint itself describe the location of the alleged defect using various terms, one of which is "shoulder crosswalk." (Appellee's Appendix to Brief on Appeal, p 2b).

Questioning from plaintiff's counsel during the deposition of Road Commission employee Earl Hughes, which plaintiff herself relies upon extensively in her Brief on Appeal, reveals that plaintiff's theory of the location of the alleged hole is within the "soft shoulder" of the highway:

> *Q.* . . . Do you recall before the sidewalk was put in that the intersection of Main Street and Jennings had a ***soft shoulder***?
>
> *A.* Correct, they did.
>
> * * *
>
> *Q.* And the road commission is responsible to maintain crosswalks and shoulders as part of the right-of-way for the safety of motor vehicle traffic?
>
> *A.* Correct.
>
> * * *
>
> *Q.* People walking from the other side here as we look at Exhibit Number 2, the south side of Jennings to the north side, ***the road***

commission is responsible to maintain that soft shoulder area as part of the crosswalk for the convenience in crossing the road?

A. It's actually maintained as part of the road itself.

* * *

Q. All right. And because you have the ***shoulder and the roadbed incorporating an area called a crosswalk***, whether you're maintaining it for pedestrians or vehicles is sort of irrelevant, isn't it?

A. Correct, yes.

* * *

Q. All right. And one of the things with a ***soft shoulder*** that comes to mind in thirty-one years at the road commission is that they need to be maintained?

A. Periodically, yes, they do.

Q. And some intersections need to be maintained more with ***soft shoulders*** than others based on traffic patterns?

A. This is true, yes.

Q. And in particular areas where you have an intersection and a ***soft shoulder*** and vehicles that are turning on to and off of an intersecting road with a ***soft shoulder***, may need more maintenance than others?

A. Yes.

Q. In other words, I could have five miles of straight road and you might not need much ***shoulder maintenance*** on that, put [sic] if you get one at the corner of Main Street or a busy street, let's call that, where cars are turning, trucks are turning with a ***soft shoulder***, you can have drop-offs and potholes created?

A. This is possible, yes.

Q. And knowing that in thirty-one years with the road commission, that's something that the road commission would be responsible to inspect for?

A. Correct.

Q. Okay. Now, what was the program called if there was one at the road commission that dealt with ***shoulder maintenance on soft shoulders***, was it a grading program, a scraping program, a fill program? Just about every different road commission I've talked to calls it something different.

A. Basically it's all three of what you just mentioned, scrape, fill, all that.

Q. All right. So would your crews be responsible to do that type of work while you were working there?

A. Yes, they would.

Q. And as I understand it, what happens is there would be a truck that would come along with a blade?

A. Correct.

Q. Scrape the shoulder first?

A. Correct.

Q. And then there would be a truck that would come along with some material, fill material?

A. Now this might all be the same truck.

Q. Okay. The process is scraping, filing and then you may have another scraping or rolling after that?

A. Yes.

Q. And then you make sure that there is no residue off on the road surface itself?

A. Correct.

Q. And the purpose of doing that is to take away ***shoulder drop-offs and potholes***?

A. Correct.

Q. The potholes can be dangerous to vehicles; is that correct?

A. Correct.

Q. They can be dangerous especially to pedestrians crossing?

A. Correct.

Q. Now a pothole at an intersection ***where the pothole's within the crosswalk or the depression is within the crosswalk***, is that more dangerous than of a pothole that is alongside a straight length of roadway to pedestrians?

A. I would imagine, yes.

Q. I mean from the road commission standpoint, would you agree with me from a reasonable standpoint that a pothole in an area where people are supposed to walk, can be more dangerous to them than a pothole in an area where you don't anticipate them walking?

A. Correct.

Q. So I mean, for example, a crosswalk like we're talking about here at Jennings and Main Street, people are directed by law to cross there?

A. Correct.

Q. So they're being told that you have to walk through this area, correct?

A. Correct.

Q. So if there's a defective condition of the road surface, ***the crosswalk or the shoulder area***, they're going to encounter it if it's within the area that the law says they have to walk?

A. Correct.

* * *

Q. If there's a condition, a pothole in a crosswalk, ***soft shoulder like we're talking about here*** that's there for more than thirty days, the road commission should have fixed it a long time ago?

A. You're correct.

* * *

Q. Now, would you agree with me that at an intersection like this with a ***soft shoulder*** would need to be worked on at least once a year because of cars driving over that soft shoulder?

A. I couldn't agree with you there. If there's not a problem, there wouldn't be any work done.

Q. If there is a problem there?

A. If there is a problem area it would have been fixed.

Q. There would have been worked [sic] done?

A. Yes.

Q. You'd agree that on the we'll call it the north side?

A. Correct.

Q. There's a wood planking hard asphalt, there's no ***soft area to degrade***?

A. Correct.

Q. And on the south side at the time that this incident occurred there wouldn't have been any concrete sidewalk?

A. No, there wasn't.

(Appellant's Appendix to Brief on Appeal, pp 76a-79a) (emphases added).

The statements by plaintiff in her Appellee's Brief and in the Complaint that the alleged defect existed in the "shoulder" area of the crosswalk takes her claim outside of the purview of the highway exception, as confirmed by *Grimes*. The questioning from plaintiff's counsel during the deposition of Earl Hughes only further confirms that the area in which the alleged surface discontinuity existed was the "soft shoulder" area, which plaintiff's counsel also described as existing within the crosswalk. In other words, plaintiff's argument appears to be that this alleged surface discontinuity existed in the soft shoulder portion of the highway, but within an area that overlapped with, was adjacent to, or was designated as a pedestrian crosswalk.

Even taking this allegation as true, the highway exception is not implicated because, as expressed clearly in *Grimes*, the alleged defect must be in the physical structure of the roadbed surface that is designed for vehicular travel. A shoulder, by its very nature, is not designed for vehicular travel. That is true whether or not the shoulder happens to be at an intersection where there is a pedestrian crosswalk.

Therefore, in light of the recent clarification to the highway exception provided by the *Grimes* Court, the alleged defect here is not one that implicates the highway exception. There is no evidence from which a reasonable jury could conclude otherwise.

RELIEF REQUESTED

WHEREFORE, for the foregoing reasons and authorities, in addition to those reasons presented in the defendant-appellant's Brief on Appeal, defendant-appellant Washtenaw County Road Commission respectfully requests that this Court reverse the lower court decisions, and thereby grant summary disposition to the Road Commission. Defendant-appellant further respectfully requests any additional relief deemed necessary, including, but not limited to, costs and fees incurred in this appeal.

DATED: July 21, 2006

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